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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 171

[EPA-HQ-OPP-2011-0183; FRL-9963-34]

Pesticides; Certification of Pesticide Applicators; Delay of Effective Date

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; delay of effective date.

SUMMARY: With this action, EPA is delaying the effective date for the final rule issued in the **Federal Register** on January 4, 2017, from June 5, 2017 to May 22, 2018. That rule addressed revisions to the Certification of Pesticide Applicators rule.

DATES: The effective date of the rule amending 40 CFR part 171 that published at 82 FR 952, January 4, 2017, delayed at 82 FR 8499, January 26, 2017, and 82 FR 14324, March 20, 2017, is further delayed until May 22, 2018.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2011-0183, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Kevin Keaney, Field and External

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SUPPLEMENTARY INFORMATION:

I. General Information

On January 4, 2017, EPA published a final rule revising the regulation concerning the certification of applicators of restricted use pesticides (RUPs), promulgated in 40 CFR part 171 (82 FR 952; FRL-9956-70). The original effective date of March 6, 2017 was extended to March 21, 2017 by a final rule published in the **Federal Register** on January 26, 2017, entitled "Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017" (82 FR 8499). In that rule, EPA delayed the effective dates of the thirty regulations, including the final rule revising the regulation concerning the certification of applicators of restricted use pesticides (RUPs) issued on January 4, 2017 (82 FR 952) (FR-9956-70), as requested in the memorandum of January 20, 2017, from the Assistant to the President and Chief of Staff, entitled "Regulatory Freeze Pending Review" (January 20 Memorandum). The January 20 Memorandum directed the heads of Executive Departments and Agencies to postpone for 60 days from the date of the January 20 Memorandum the effective dates of all regulations that had been published in the Federal Register but had not yet taken effect.

The January 20 Memorandum further directed that where appropriate and as permitted by applicable law, agencies should consider a rule to delay the effective date for regulations beyond that 60-day period. Accordingly, on March 20, 2017, EPA published the final rule "Further Delay of Effective Dates for Five Final Regulations Published by the

Environmental Protection Agency Between December 12, 2016 and January 17, 2017” (82 FR 14324), to give recently arrived Agency officials the opportunity to conduct a substantive review of those five regulations, which included the revised Certification of Pesticide Applicators rule. Pursuant to that March 20, 2017 rule, the effective date of the revised Certification of Pesticide Applicators rule was extended to May 22, 2017.

On May 15, 2017, EPA solicited public comment on a proposed 12-month delay of the effective date until May 22, 2018 (82 FR 22294; FRL-9962–31). EPA received more than 130 comments in response to the May 15, 2017 request for comments on the proposal to further delay the effective date until May 22, 2018. On May 22, 2017, EPA published a rule that made an interim extension of the effective date of the revised Certification of Pesticide Applicators rule until June 5, 2017 in order to allow additional time for Agency officials to consider and respond to the public comments.

Section 553(d) of the Administrative Procedure Act, 5 U.S.C. 553(d), allows the effective date of an action to be less than 30 days from its publication date when a good cause finding is made. The primary reason for the 30-day waiting period between publication and effective date is to allow affected parties to adjust to new requirements. This rule does not impose any new requirements but rather postpones the effective date of requirements that are not yet in effect. As noted below, allowing the rule to go into effect could cause confusion and disruption for affected parties if the rule were subsequently substantially revised or repealed. Thus, EPA finds there is good cause to make this rule effective immediately upon publication.

In addition, EPA still has only one Senate-confirmed official, and the new Administration has not had the time to adequately review the January 4, 2017 certification

rule. This extension to May 22, 2018, will prevent the confusion and disruption among regulatees and stakeholders that would result if the January 4, 2017 rule were to become effective (displace the existing regulation) and then substantially revised or repealed as a result of administrative review.

In this final rule, EPA is delaying the effective date of the January 4, 2017 revisions to the Certification of Pesticide Applicators rule until May 22, 2018. EPA is delaying the effective date of the January 4, 2017 revisions to the Certification of Pesticide Applicators rule until May 22, 2018 in accordance with the Presidential directives as expressed in the memorandum of January 20, 2017, from the Assistant to the President and Chief of Staff, entitled “Regulatory Freeze Pending Review,” and the principles identified in the April 25, 2017 Executive Order “Promoting Agriculture and Rural Prosperity in America.”

II. Comments and Responses

EPA received more than 130 comments relevant to the proposal to further delay the effective date of the January 4, 2017 Certification of Pesticide Applicators rule until May 22, 2018. Seventeen comments were not relevant to this action because they did not address the extension of the effective date and instead urged EPA to ban chlorpyrifos or only included specific comments about the January 4, 2017 rule. Out of the relevant comments, 18 commenters supported the proposed 12-month extension of the effective date and the rest opposed the proposed 12-month extension.

Comments – specific provisions. About 20 of the comments included input on the specific provisions of the January 4, 2017 Certification of Pesticide Applicators rule.

EPA response – specific provisions. This final rule focuses on the extension of the effective date of the certification rule. Comments on the specific provisions of the revised

certification rule are outside of the scope of this final rule and will be considered within the review of the rule through the Regulatory Reform Agenda efforts.

Comments – support. The comments supporting the 12-month extension of the effective date came from state pesticide regulatory agencies, a pesticide safety education program and a number of organizations representing state departments of agriculture, pesticide safety education programs, pesticide applicators, growers, pesticide manufacturers, and pesticide retailers. The commenters supported the 12-month extension for a variety of reasons. The most common reason was to allow EPA and states more time to prepare for the revisions to state certification programs, engage stakeholders, and develop information the states need to efficiently implement the January 4, 2017 rule. Some commenters supported the 12-month extension to give EPA time to revisit certain aspects of the January 4, 2017 rule and identified specific requirements, such as minimum age.

EPA response – support. EPA generally agrees with these comments. During the next 12 months, EPA plans to engage and work with the certifying authorities (states, tribes and federal agencies), pesticide safety education programs, pesticide applicators and other stakeholders to develop checklists, guidance and tools to facilitate the development of revised certification plans and to discuss how to effectively implement the certification rule. In addition, EPA will conduct a substantive review of the questions of fact, law and policy – all within the context of the very broad cost-benefit standard in FIFRA – during this period. As mentioned above, comments on the specific provisions of the revised certification rule will be considered within the review of the rule through the Regulatory Reform Agenda efforts.

Comments – adjust implementation schedule. One state pesticide regulatory agency supported the 12-month extension of the effective date of the Certification of Pesticide Applicators Rule as long as the implementation schedule in the January 4, 2017 rule is extended as well. This implementation schedule allowed three years for certifying authorities to submit revised plans and an additional two years for EPA to review the plans and agree upon a timeline for the certifying authority to implement the plan.

EPA response – adjust implementation schedule. EPA agrees with this comment and intends to make corresponding changes to the implementation dates in 40 CFR 171.5 in a subsequent rulemaking.

Comments – implement protections sooner. The commenters opposing the 12-month extension included over 30 non-governmental organizations representing a range of interests, including but not limited to farm workers, environmental advocates, occupational or migrant health clinics and employment law, and many private citizens. The concerns raised by the commenters opposed to the delay covered several areas, which are summarized and responded to below.

The commenters urged EPA to begin implementing the rule in May 2017 to allow the intended protections to apply sooner. A few commenters argued that the extension would increase the risk of serious adverse effects on human health and the environment and one commenter pointed out that EPA identified preventable restricted use pesticide exposures to humans and the environment in the January 4, 2017 rule. This commenter stated that delaying the rule by a year means these types of exposures will occur for an additional year.

EPA response – implement protections sooner. The January 4, 2017 final certification rule would not have immediately put in place additional protections that would prevent or

eliminate the types of exposures identified by EPA in its benefits analysis. The January 4, 2017 rule included an implementation schedule where the certifying authorities would have up to three years to submit revised certification plans that conform to the revised standards, so there already was going to be a delay in the protections actually being implemented by the certifying authorities. If EPA develops checklists, guidance and tools to facilitate the development of revised certification plans during the 12-month delay, it is possible that many certifying authorities will be able to submit the revised certification plans well before the three-year deadline for submitting plans.

Comments – basis for extension. Several commenters argued that EPA did not provide a rational basis for extending the effective date by a year, with one stating that, for that reason, the rule to extend the compliance date is arbitrary and capricious and an abuse of discretion. The commenters questioned what steps have been taken during the previous 4 months of extensions, what analyses would be done in the next year and why EPA needs 12 more months.

EPA response – basis for extension. Out of the 30 final regulations whose effective dates were delayed by the January 26, 2017 final rule, this is one of the few regulations with an effective date that has been extended several more times. The Administrator has determined that the certification rule requires a substantive review of the questions of fact, law and policy – all within the context of the very broad cost-benefit standard in FIFRA -- so an additional 12 months is necessary and will provide more certainty to certifying authorities, pesticide safety education programs, pesticide applicators and other stakeholders than to have several medium term extensions. Extending the rule by 12 months is also more efficient for EPA staff and allows them to focus on the substantive review rather than drafting and

implementing several medium term extensions. The 12-month extension also provides time for EPA to consider revisions to the certification rule based on input received through the Regulatory Reform Agenda efforts.

Comments – Administrative Procedures Act. Several comments argued that the May 15, 2017 rule violated the Administrative Procedures Act (APA) in several ways. First, commenters argued that the May 15 rule is a “final rule” that makes a significant amendment to a lawfully promulgated regulation without first proposing the change and seeking public comment. Second, commenters raised a number of concerns about the five-day comment period. Specifically, commenters argued that a delay of the effective date for 12 months is functionally a substantive amendment or rescission of the certification rule so the APA and FIFRA require a notice and comment period of at least 30 days. Commenters also stated that sections 553(d)(1) and (d)(3) of the APA are inapposite (not pertinent) as legal authority for dispensing with a “full...comment period” because these sections provide grounds to the generally applicable requirement that no final rule take effect sooner than 30 days after its publication but not the length of the comment period. Some commenters argued that the good cause exception to the APA’s notice requirement in 5 U.S.C. § 553(b)(B) is not relevant to the May 15, 2017 rule. Lastly, commenters disagreed with EPA’s reasoning in the May 15, 2017 rule that a full 30-day comment period is impractical, unnecessary and contrary to the public interest.

EPA response – APA. The May 15, 2017 FR Notice was styled as a final rule to be consistent with standard procedures of the Office of the Federal Register, which require that rules that affect existing rules (in the case of rules that address changing the effective date of an existing rule) must appear in the “Final Rules” section of the Federal Register. See OFR

Document Drafting Handbook (<https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf>) at section 3.1. Irrespective of the “Final Rule” caption, EPA considers the May 15 Federal Register Notice to have the effect of a proposed rule under the APA. This is clear from the phrase “request for comments” in the action line, as well as from the text of the FR Notice, where EPA expressly stated that it was “proposing to further delay the effective date” and requested comment on the proposed extension.

The Agency’s implementation of this action with an abbreviated opportunity for public comment is based on the good cause exception in 5 U.S.C. 553(b)(B), in that providing additional time for public comment is impracticable, unnecessary and contrary to the public interest. The delay of the effective date until May 22, 2018, is necessary to give Agency officials the opportunity for further review and consideration of the certification rule, consistent with the memorandum of the Assistant to the President and Chief of Staff, dated January 20, 2017, and the principles identified in the April 25, 2017 Executive Order “Promoting Agriculture and Rural Prosperity in America.” Given the imminence of the certification rule effective date, allowing a longer period for comment on this delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations.

The 90-day comment period for the 2015 proposed rule, combined with EPA’s extensive stakeholder outreach, provided EPA with robust public comment regarding the risks and benefits associated with the January 4, 2017 certification rule. Inasmuch as there was already a robust public comment on the merits of the certification rule, the narrow issue of when the rule should become effective could reasonably be addressed in a short period of time. If EPA had not shortened the comment period to five days, the January 4, 2017

certification rule would have gone into effect. It would have caused unnecessary confusion and disruption to certifying authorities, pesticide safety education programs, pesticide applicators and other stakeholders for the certification rule to go into effect and then potentially be substantially revised or repealed following a substantive review.

Comments – FIFRA. Some commenters argued that the May 15, 2017 rule violates FIFRA, which requires rules to be reviewed by the U.S. Department of Agriculture and the FIFRA Scientific Advisory Panel. FIFRA also requires a 60-day effective date and requires EPA to transmit a copy of the final rule to Congress at the beginning of this 60-day period.

EPA response – FIFRA. EPA disagrees that the proposed extension of the effective date of the certification rule violates FIFRA. EPA is issuing this extension of the effective date of the certification rule as an APA rule and not a FIFRA rule because today's rule is only changing the effective date of a final rule that had not become effective.

Comments – Endangered Species Act. A few commenters argued that the May 15, 2017 rule violates the Endangered Species Act. Section 7 of the ESA requires federal agencies to consult with the Fish and Wildlife Service and the National Marine Fisheries Service unless EPA determined that its extension of the effective date has “no effect” on threatened and endangered species and their designated critical habitat.

EPA response – Endangered Species Act. EPA believes that its actions with respect to deferring the implementation of this rule are not inconsistent with its obligations under the Endangered Species Act.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review; and, Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not involve any information collection activities subject to the PRA, 44 U.S.C. 3501 *et seq.*

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under RFA, 5 U.S.C. 601 *et seq.*

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000).

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866.

H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards that would require Agency consideration under NTTAA section 12(d), 15 U.S.C. 272 note.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action would not have disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.*, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. §804(2).

List of Subjects in 40 CFR Part 171

Environmental protection, applicator competency, agricultural worker safety, certified applicator, pesticide safety training, pesticide worker safety, pesticides and pests, restricted use pesticides.

Dated: May 26, 2017,

Wendy Cleland-Hamnett,

Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

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